Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STEVEN D. DONOVAN

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

STEVEN D. DONVAN pro se.
Reg. No. 03293-089
U.S.P. Leavenworth
Leavenworth, KS.
66048-1000

74 pp

QUESTIONS PRESENTED

I.

Whether the lower courts' holding that a petitioner's claims under Section 2255 that were not presented on direct appeal were procedurally defaulted even when he demonstrated such failure was due to ineffective assistance of appellate counsel--so departed from the usual course of judicial proceedings as to warrant this Court's supervisory intervention and/or has unnecessarily created a conflict amongst the circuits?

(a) Whether a Section 2255 petitioner is entitled to an evidentiary hearing on claims which, if proven, would entitle him to relief?

(b) Whether the district court had erroneously invoked summary dismissal under Rule 4 of the Rules Governing Section 2255 Proceedings on Constitutional claims of ineffective assistance of trial and appellate counsel without first permitting petitioner to fully establish the factual basis for his claims?

PARTIES TO THE PROCEEDINGS

Petitioner Steven D. Donovan was an appellant in *U.S. v. Donovan*, No. 95-2720 (7th Cir. 1996) (unpublished order).

The United States was the only Respondent-Appelle in these proceedings.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Seventh Circuit affirming the conviction is reproduced at pages 2a - 5a of the Appendix to this Petition and the opinion and Order of the United States District Court for the Eastern District of Wisconsin is reproduced at pages 6a - 33a of the Appendix to this Petition.

JURISDICTION

The jurisdiction of the district court was based on 18 U.S.C. Sec. 3231. The United States Court of Appeals for the Seventh Circuit, with jurisdiction pursuant to 28 U.S.C. Sec. 1291, issued its decision on December 18, 1996.

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, in part, states:

> No person shall be ... deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution, in part, states:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

Rule 4(b) of the Rules Governing Sec. 2255 Proceedings provides that:

> ...If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the

movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the U.S. Attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

STATEMENT

On January 7, 1992, a grand jury returned a six-count superseding indictment charging four persons, including Petitioner Steven Donovan, with offenses related to cocaine trafficking and conspiracy to do the same.

On February 18, 1992, all four defendants proceeded to trial. A major portion of the government's allegations were based on the testimony of admitted drug dealers who cut extraordinary deals with the prosecution in exchange for their testimony.

As a consequence of trial counsel's negligence, on February 27, 1992, the jury returned guilty verdicts against each of the defendants on all counts.

In October 19, 1992, the district court, after finding Petitioner had two prior state convictions for possession with intent to distribute relatively small quantities of marijuana and cocaine, sentenced him to **LIFE** without parole.

The district court appointed counsel to represent Petitioner on direct appeal. On May 13, 1994, the Seventh Circuit, finding no merit in the issues raised by appellate counsel, affirmed Petitioner's conviction in a published opinion. *United States v. Donovan*, 24 F.3d 908.

In mid April, 1995, Petitioner notified the district court by mail that appellate counsel was ineffective for refusing to raise all his requested appellate issues. See Record of 4/22/95 and 4/23/95.

On May 1, 1995, Petitioner filed his first motion, pro se, under Sec. 2255 with annexed documents and affidavits supporting his claims of ineffective assistance of trial and appellate counsel combined with additional claims of Constitutional violations. (Record at 120) (Discussed below)

On June 9, 1995, the district court summary dismissed the Sec. 2255 Motion pursuant to Rule 4 of

the Rules Governing Sec. 2255. The court dismissed the Motion without an evidentiary hearing and without ordering the U.S. Attorney to file an answer. The court found that because Petitioner had different counsel at trial and on appeal; failure to show cause for failing to raise on direct appeal the grounds raised in his motion barred them from consideration, concluding that it plainly appears from the face of the motion and exhibits that he is not entitled to relief. App. 17a, 20a.

REASONS FOR GRANTING THE WRIT

These issues present vexing questions impacting on the requirements of Due Process contained in the Fifth Amendment to the United States Constitution.

The court below has so departed from the accepted and usual course of judicial proceedings in this cause by usual course of judicial proceedings in this cause by erroneously invoking Rule 4(b)

of the Rules Governing Sec. 2255 when Petitioner's Motion contained several meritorious Constitutional claims that would entitle him to relief.

Upon review of a question presented to this Court in *Billy-Eko v. United States*, __ U.S. __, 113 S.Ct. 2989 (1993), of whether a Sec. 2255 petitioner, raising under the Sixth Amendment an ineffective assistance of counsel challenge to his federal conviction, is procedurally barred from making that challenge for failure to raise the issue on direct appeal. The Solicitor General conceded in his brief to the Court stating that there are several justifications for allowing ineffective assistance claims to be brought on collateral attack even if not brought on direct appeal, or even for establishing a preference that the claim be brought on collateral attack. The Second Circuit Court of Appeals held on remand from this Court that ineffective assistance claims are appropriately brought in Sec. 2255 petitions even if overlooked on direct appeal.

Billy - Eko v. United States, 8 F.3d 111, 114 (1993). However, the court commented that if the defendant has new appellate counsel on direct appeal, and the record is fully developed on the ineffective assistance issue, there is little reason to extend the defendant an unlimited opportunity to delay bringing the claim. Thus, in this narrow category of cases, but only in these cases, the petitioner must still show cause for not bringing the ineffective assistance claim on direct appeal, and prejudice resulting therefrom. Id.

Circuit Discord

The lack of circuit harmony on this issue can be found in the following circuit decisions: The Third Circuit held that this Court's "cause and prejudice" standard applicable to habeas corpus petitioners announced in *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584 (1982), did not apply to an ineffective

assistance of counsel claim, raised in a post conviction motion to vacate sentence and, therefore, defendant was not required to show cause and prejudice with respect to his failure to raise the claim on direct appeal. *United States v. DeRewal*, 10 F.3d 100 (1993). The government withdrew its contention--that DeRewal was required to show "cause and prejudice" with respect to his failure to raise his ineffective assistance of counsel claim on direct appeal--based on the position asserted by the Solicitor General in this Court in the case of *Billy-Eko*. *DeRewal* Id. at 103. The Solicitor General's position was that resolution of claims of ineffective assistance of trial counsel often requires consideration of matters outside the record on direct appeal and that should be considered by the district court in the first instance.

The Seventh Circuit, in affirming the summary dismissal of Petitioner's Motion, relied on their previous holding in

Guinan v. United States, 6 F.3d 468 (7th Cir. 1993), (decided one month prior to the decision of this Court in *Billy-Eko*), that claims of ineffective assistance which are based upon the trial record alone must be brought on direct appeal or they are procedurally defaulted. Id. at 472.

Judge Easterbrook concurred in this holding explaining that:

> ...a new lawyer representing a defendant on appeal finds that it is impossible to upset a conviction by pointing to his predecessor's actions. Why impossible? Because the absence of a complete record prevents definitive action. Id. at 473.

Judge Easterbrook further explained that:

> Rules of procedure should be designed to induce litigants to present their

contentions to the right tribunal at the right time. For ineffective assistance, the court of appeals on direct appeal is the wrong tribunal at the wrong time. Id. at 474.1

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1. This Court granted certiorari in *Chappell v. United States*, 494 U.S. 1075, 110 S.Ct. 1800 (1990), a case presenting a similar question. The Seventh Circuit had held that *Chappell* was barred from raising a claim of ineffective assistance of trial counsel in Sec. 2255 motion because he had been represented by new counsel on direct appeal and therefore could have raised the claim at that time. 878 F.2d 384 (1989) (judge order). Based on the position asserted by the Solicitor General, this Court vacated the judgment and remanded the case even though *Chappell* had not shown cause, as Petitioner had in the instant case, for his failure to raise the claim earlier.

Easterbrook commented that he was puzzled by the majorities conclusion that if the defendant has a new lawyer on appeal, like here, then counsel must take a futile step in order to preserve his client's entitlement to judicial review of the lawyer's performance. "Having taken this doomed step, the defendant is foreclosed from making additional arguments under Sec. 2255." Id.

A panel of the Tenth Circuit granted *en banc* review in *United States v. Galloway*, 56 F.3d 1239 (1995), to review procedures in the Circuit for asserting ineffective assistance claims. The court held that virtually all claims--even those which might conceivably be brought on direct appeal--should be brought in collateral proceedings. The court further held that the procedural rule of *Frady*, supra, does not apply to ineffective assistance claims. Id. at 1241. The Tenth

Circuit noted that they "largely agree" with the sentiments expressed in the concurring opinion of Judge Easterbrook in *Guinan*, noted above.

(a) Proper application of the statutory scheme involves a two-step inquiry:

(1) Does the record in the case conclusively negate the factual predicates asserted in support of the 2255 Motion?

(2) Would the Petitioner be entitled to the relief sought if the factual allegations which are not conclusively refuted by the record are, in fact true?

If the answer to the first question is no and the answer to the second question is yes, the district court must hold an evidentiary hearing on the factual allegations that are not conclusively refuted. *Machibroda v. United States*, 368 U.S. 487, 494-496, 82 S.Ct. 510 (1962).

The Third Circuit held in *United States v. Day*, 969 F.2d 39 (1992), that the district court judge cannot summarily dismiss a 2255 motion "unless the motion, files and records of the case conclusively establish the moving party is entitled to no relief." The allegations of the 2255 motion must be accepted as true for purposes of determining whether or not to grant an evidentiary hearing. *Accord United States v. Briggs*, 939 F.2d 222, 228 fn. 17 (5th Cir. 1991).

Additionally, the remedy under Sec. 2255 was designed to be "exactly commensurate" with the federal habeas corpus remedy, *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224 (1977); *Hill v. United States*, 368 U.S. 424, 427, 82 S.Ct. 468 (1962); *United States v. Hayman*, 342 U.S. 205, 219, 72 S.Ct. 263 (1952), and has been construed in accordance with that design, e.g., *Sanders v. United States*, 373 U.S. 1, 6-14, 83 S.Ct. 1068 (1963).

> The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty.

Price v. Jonston, 334 U.S. 266, 269, 68 S.Ct. 1049 (1948).

(b) Summary dismissal is appropriate only where the allegations in the petition are "vague [or] conclusory" or "palpably incredible", *Blackledge v. Allison*, 431 U.S. 63, 75-76, 97 S.Ct. 1621, 1629-30 (1977) (quoting *Machibrada*, supra, at U.S. 495, S.Ct. at 514 (1961), or "patently frivolous or false". Id. at 76, 79 S.Ct. at 1630.

The pivotal question is whether or not the facts set forth in Petitioner's Sec. 2255 Motion, accepted as true, would warrant relief as a matter of law. Unless the answer is no, the district court has committed a patent abuse of discretion in

dismissing the Motion without giving the moving party the chance to establish the facts.

Petitioner raised claims in his Sec. 2255 that did not mandate invoking so drastic a measure as summary dismissal under Rule 4.

Petitioner's claimed errors were of a constitutional magnitude, supported by Supreme Court precedent, that directly affected his right to a fair trial and right to effective representation.

Specifically, Petitioner argued that his trial counsel rendered ineffective assistance by: (1) refusing to permit him to testify in his own behalf, contrary to this Court's holding in *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704 (1987); (2) failing to challenge a purposeful pretrial intrusion by the government upon his confidential communications with his attorney. The attorney/client meeting was recorded while Petitioner was in his attorney's office discussing trial preparations. This Court

previously held in *Black v. United States*, 385 U.S. 26, 87 S.Ct. 190 (1966), that such a violation warranted a new trial; (4) failing to motion to suppress audio and visual recordings of Petitioner and an informant depicting what the prosecution alleged was a failed attempt by the DEA to sell Petitioner narcotics. The DEA failed to obtain judicial authorization prior to initiating the surveillance as mandated by Rule 41 of the Federal Rules of Criminal Procedure and was admitted into evidence contrary to the holding in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967) Nor were the tapes sealed in compliance with Title 18 U.S.C. Sec. 2518(8)(a), contrary to *United States v. Ojeda Rios*, 495 U.S. 257, 110 S.Ct. 1845 (1990).

The video recording was highly prejudicial because it depicted a small child in the proximity of what the prosecution portrayed to the jury as an attempted narcotics transaction.

And finally, to satisfy the "cause" prong of *Strickland*

v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), Petitioner claimed in the courts below that his failure to raise the issues that could be raised in the Sec. 2255, i.e.; the issues preserved on the record, was due to ineffective assistance of appellate counsel.2

For instance, trial counsel objected to the government's admission of unscreened 404(b) evidence of Petitioner's prior state conviction, preserving it for appellate court review. The

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2. This Court held in *Murray v. Carrier*, 477 U.S. 478, 483, 488-89, 106 S.Ct. 2639 (1986), that ineffective assistance of counsel may itself provide cause for procedural default.

Previous Seventh Circuit precedent has recognized that a showing of ineffective assistance of appellate counsel establishes cause for a defendant's failure to raise a claim earlier. *Rosenwald v. United States*, 898 F.2d 585, 587 (1990).

prior bad act evidence was admitted through the solicited testimony of a prosecution witness. (Trial Transcript at 302) (Hereinafter "Tr. ___") Trial counsel motioned for a mistrial, which the court denied. (Tr. 394-95) No limiting instruction was provided to the jury. Petitioner's prior record was admitted completely contrary to this Court's holding in *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S.Ct. 1496, 1502 (1988).

In addition, defense counsel had submitted a pretrial motion *in limine* seeking to exclude prior bad acts of Petitioner's pursuant to Fed.R.Evid. 609(a), (Record at 41), which the court failed to address. Furthermore, the prior bad act evidence was more prejudicial than probative since his counsel, without his approval and inconsistent with his claim of innocence, inexplicably implicated him during summation by directing the following statement to the jury: "They (the defendants) are all involved in buying and selling drugs." (Tr. 1711) The very charges Petitioner was on trial for.

Petitioner's appellate counsel was clearly constitutionally ineffective for failing to raise the claims that were supported by the record.

The district court dismissed Petitioner's Motion despite its acknowledgment of his claim that his failure to raise these issues were the result of ineffective assistance of appellate counsel, and even though he had notified the court of his appellate counsel's refusal to comply with his appellate issues.

The lower court further found none of the grounds raised in Petitioner's Sec. 2255 to be "clearly stronger" than those raised by his appellate counsel on direct appeal. App. 5a, 19a.

It is unfathomable how the lower court could reason that Petitioner's appellate counsel could well have concluded that there was insufficient merit to pursue the issues he now complains, or that they would

have "detracted" from the arguments made on appeal. App.19a.3

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3. Petitioner's appellate counsel raised three completely frivolous arguments on direct appeal. First he argued that Wanda Young should not have been allowed to testify because she relied on documentary evidence taken from Petitioner and given to the IRS. There was no objection to this testimony at trial preserving it for review as the Seventh Circuit noted. Secondly, he argued that his client's right against self-incrimination was violated by the government's remarks. The Seventh Circuit pointed out that counsel failed to specify what comments constitute this abrogation of his rights. And finally, counsel argued that the district court "failed" to instruct the jury on multiple conspiracies. The Seventh Circuit rightly found that the district court properly instructed the jury. 24 F.3d at 915-17.

On December 18, 1996, the Seventh Circuit affirmed the district court's dismissal of the Motion reiterating much of the district court's findings.

In regard to the surreptitious pretrial intrusion by the government into Petitioner's attorney/client conference in Chicago, the Seventh Circuit mistakenly found that the record concerning the informant, Wanda Young's attendance in Chicago was fully developed before trial and therefore held that the claim could have been raised on appeal. App. 3a. The facts, however, are distinctly different in that the pretrial motion filed by trial counsel only noted an "unsuccessful attempt" by Young to be present during a post-indictment communication between Petitioner and counsel. (R. 40 at 3) The incident Petitioner now argues is when the government had Young successfully record the attorney/client conference on November 16, 1991, which Petitioner's trial counsel was

unaware of at the time he filed the motion. Young had wrote Petitioner a letter on August 8, 1992, informing him that she was "wired" while at his attorney's office. Young's letter was made part of the record in the court below. (R.120). Wanda Young, at the direction of the DEA agent, deceptively led Petitioner to believe that she was in need of counsel due to, as she claimed, the agent harassing her for information. This scheme was perpetrated by the agent for the sole purpose of learning privileged defense strategy, a practice this Court repeatedly denounced. e.g.; see *Maine v. Moulton*, 474 U.S. 159, 171, 106 S.Ct. 477, 487 (1985). The Court commented:

> we...have made clear that, at the very least, the prosecutor and the police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel. Id.

The prosecution used the information recorded by Young to structure their witness testimony accordingly. It is noteworthy to add that the government refused to disclose the tape to the Petitioner so as to determine the exact contents and its effect on his counsel's preparation for trial.

This blatant pretrial intrusion denied Petitioner due process of law and unconstitutionally tainted the trial process.

Ineffective assistance claims are often based on assertions that counsel made errors of omission, errors that are difficult to perceive from the record: For example, why Petitioner's counsel refused to permit him to testify in his own defense? Why defense counsel failed to challenge the admission of an unauthorized video recording (with audio sound) which took place in a hotel suite where a justifiable expectation of privacy existed.

This Court held that the use of video surveillance in a non-public place where a

constitutionally protected expectation of privacy exists judicial authorization is required and would otherwise implicate the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967).

The court below, in an earlier decision, made its view clear that a warrant for television surveillance that did not satisfy the Fourth Amendment's requirement of particularity would violate the Fourth Amendment. *United States v. Torres*, 751 F.2d 875, 885 (7th Cir. 1984).

Remarkably, the court below in a comparable, but unrelated case held, where a defendant had different counsel at trial and on appeal, that:

> ...failure of petitioner to raise ineffective assistance of counsel claim on direct appeal did not preclude its consideration on his motion to vacate,

set aside or correct sentence, insofar as claim was based on trial counsel's failure to file motion to suppress evidence.

Bond v. United States, 1 F.3d 631 (7th Cir. 1993) ("A defendant who presents an ineffective counsel claim for the first time on direct appeal has little to gain and everything to lose." Id. at 635). *Cf*. *Holman v. Page*, 95 F.3d 481 (7th Cir. 1991) (Holding under this Court's *Strickland* test no prejudice exists when evidence gathered in violation of the Fourth Amendment is erroneously admitted at trial). On petition for rehearing *en banc*, 102 F.3d 872, the three dissenting judges in *Holman* expressed concern over the majorities disregard of clear Supreme Court precedent by choosing to adopt instead of separate opinion of Justice Pewel J. in *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574 (1986), noting that other courts of appeals have followed the *Kimmelman* holding,

including the Seventh Circuit before the *Holman* opinion. Id. at 873.

The dissenting judges in *Holman* further commented that:

> The panel holds that ineffectiveness of counsel can never be shown by demonstrating that counsel's performance fell below the standard set forth in *Strickland* when the issue counsel failed to raise was based upon the Fourth Amendment, because as a matter of law no "prejudice" results. In my view, this conclusion is inconsistent with the governing Supreme Court law in this area. ...The panel's decision squarely conflicts with the Supreme Court's holding in *Kimmelman* that defendants may properly base ineffective assistance of counsel claims in a habeas corpus action

> on the assertion that their attorney failed properly to litigate a Fourth Amendment claim.

Holman, supra, at 873.4

See *Huygh v. King*, 95 F.3d 1052 (11th Cir. 1996), reaching the opposite conclusion on the same day as the decision reached in *Holman*.

The district court should have ordered an evidentiary hearing on Petitioner's claims

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4. In *Stone v. Powel*, 428 U.S. 465, 96 S.Ct. 3037 (1976), this Court held that because Fourth Amendment rights ought to be litigated at trial, defendants cannot invoke habeas review to attack Fourth Amendment errors. However, ten years later, this Court in *Kimmelman v. Morrison*, 477 U.S. 365, 378 fn. 3, 106 S.Ct. 2574, 2584 & fn. 3 departs from this prohibition only where, as here, a defendant claims that the failure to assert Fourth Amendment rights constituted ineffective assistance of counsel.

of ineffective assistance of counsel and to evaluate the ensuing prejudice sustained as a result of the government's surreptitious intrusion upon his confidential communications with counsel. These issues require an assessment beyond the scope of the present record.

The court below previously acknowledge in *United States v. Taglia*, 922 F.2d 413, 418 (7th Cir. 1991), that:

> ...In the usual case extrinsic evidence is necessary to prove that counsel's assistance was ineffective, because without such evidence counsel's apparent pratfalls will be presumed to be failed strategems rather than professional malpractice.

An evidentiary hearing should be held when there are important issues of fact which were not adequately developed at trial, the failure to

develop the facts was not due to the defendant's neglect or deliberate bypass, and the record does not conclusively demonstrate that the petitioner is entitled to no relief. *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745 (1963).

The effectiveness of Petitioner's trial lawyer's performance cannot be evaluated without an evidentiary hearing at which time the lawyer is asked to explain why he did not follow seemingly promising lines of defense.

Petitioner avers that his trial and appellate counsels' negligence fell so far below minimal standards that the results of his trial was unreliable and fundamentally unfair.

This Court must agree that Petitioner's claims, when unanswered, cannot be characterized as so incredible or frivolous as to warrant summary dismissal.

The district court's decision to invoke Rule 4(b) was an abuse of discretion

when Petitioner had set forth his claims for relief with some specificity and included relevant citations to the record.

Summary dismissal of the Motion does not square with case law defining what constitutes the exercise of sound judicial discretion in the context of ruling on a *pro se* Sec. 2255 motion. Wherefore, Petitioner prays that the Court grant the Writ of Certiorari and reverse the summary dismissal of the Sec. 2255 Motion and remand the case to the district court for an evidentiary hearing in order to develop a factual record.

Certiorari ought to be granted on this issue for the reasons indicated.

Respectfully submitted,

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